

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

OWEN ELECTRIC COOPERATIVE

COMPLAINANT

VS.

THE UNION LIGHT, HEAT AND POWER COMPANY

DEFENDANT

CASE NO. 89-278

O R D E R

On November 2, 1989, the Commission entered an Interim Order prohibiting The Union Light, Heat and Power Company ("ULH&P") from furnishing, making available, rendering, or extending retail electric service to any electric-consuming facility in any part of the Saddlebrook Farms Subdivision which lies within the territory certified to Owen Electric Cooperative, Inc. ("Owen") pursuant to the Certified Territory Act, KRS 278.016-278.018. The Commission's Order further provided that a final decision on the merits would not be issued until the Boone Circuit Court rendered a final decision on the constitutionality of the Certified Territory Act in City of Florence, et al v. Owen County RECC, et al.¹ By decision entered August 24, 1990, the Boone Circuit Court

¹ Civil Action No. 89-CI-388 (Boone Cir. Ct. Ky., August 24, 1990).


upheld the constitutionality of the Certified Territory Act. A copy of that decision is attached hereto as Appendix A.

Based on the evidence of record and the decision of the Boone Circuit Court, the Commission hereby finds that its November 6, 1989 Order should be made final. The Commission further finds that this case should be terminated without prejudice to the right of either party to seek further relief in the event that the decision of the Boone Circuit Court is modified on appeal.

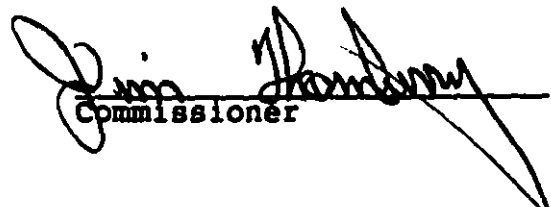
IT IS THEREFORE ORDERED that ULH&P shall not furnish, make available, render, or extend retail electric service to any electric-consuming facilities in any part of the Saddlebrook Farms Subdivision which lies within the certified territory of Owen.

Done at Frankfort, Kentucky, this 21st day of November, 1990.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director

APPENDIX A
APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC
SERVICE COMMISSION IN CASE NO. 89-278 DATED Novmeber 21, 1990

BOONE CIRCUIT COURT

CASE NO. 89-CI-358

THE CITY OF FLORENCE, KENTUCKY
AND
THE UNION LIGHT, HEAT AND POWER COMPANY

PLAINTIFFS

VS.

MEMORANDUM OF DECISION & JUDGMENT

OWEN ELECTRIC COOPERATIVE, INC.

DEFENDANTS

AND

FREDERIC J. COWAN, JR.

ATTORNEY GENERAL

AND

PUBLIC SERVICE COMMISSION OF KENTUCKY

INTERVENING DEFENDANT

This case is before the Circuit Court upon cross motions for Summary Judgment. For purposes of this Decision the Court will refer to the City of Florence, Kentucky, as the "City"; the Union Light, Heat and Power Company will be "Union"; Owen Electric Cooperative, Inc. will be "Owen"; and Public Service Commission of Kentucky will be "Commission".

FACTS

The parties have submitted an "agreed set of facts", a summary of which follows:

The City of Florence is a municipal corporation of the third class. Union Light, Heat and Power Company is a utility providing electric service to customers within the City of Florence. By Ordinances No. 0-31-73 and 0-34-73, the City, on October 9, 1973, granted Union an exclusive twenty (20) year franchise to use the streets, roads and public ways within the City for the construction and

maintenance of facilities necessary to provide electric service in the City.

Owen is also an electric utility serving customers in Boone County. Both Union and Owen are regulated by the Kentucky Public Service Commission and have had territory certified to each of them as service territory by the Commission pursuant to Kentucky Certified Territory Act. (KRS 278.016-278.020)

After granting its franchise to Union in 1973,, the City annexed additional territory extending the boundaries of the City. As a result of those annexations, the City's boundaries presently include areas that are in the certified service territory of both Union and Owen.

Some of this territory is undeveloped and is not yet being served by Union or Owen. The City claims that its franchisee, Union, should provide electrical service in these undeveloped areas without regard to certified territory boundaries.

Plaintiffs ask this Court to declare that the franchise agreement between the City and Union give Union the exclusive right to serve all customers within the City's boundaries, even though some customers are within the exclusive certified territory of Owen by the Public Service Commission of Kentucky pursuant to the Certified Territory Statute. To do so would require the Court to find six sections of the Kentucky Revised Statutes unconstitutional.

Defendants contend that the statutes in question are constitutional and that Owen has the exclusive right to serve all

customers within its certified territory, including those within the city.

Plaintiffs' arguments that the Certified Territory Statute, KRS 273.016 - 273.018, and KRS 96.538, 81A.490 and 279.110(5) are unconstitutional by virtue of Sections 163 and 164 of the Kentucky Constitution are not persuasive. There is a strong presumption in favor of the constitutionality of legislative acts. See Jefferson County Police Merit Board v. Bilyeu, Ky., 634 S.W. 2d 414 (1982).

The memoranda submitted cite many cases in an effort to persuade the Court. However, it appears that the The City of Nicholasville v. Blue Grass Rural Electric Cooperative corporation, Ky., 514 S.W. 2d 414 (1974) and Southern Bell Telephone & Telegraph Co. v. City of Louisville, 265 Ky. 286, 96 S.W. 2d 695 (1936) are controlling. City of Nicholasville arises from a factual situation similar to the one at hand. There the Court specifically upheld the constitutionality of KRS 96.538 and held that it prohibits a city from extending the services of its own electric plant into that part of the annexed territory of Nicholasville in which the statute gives the electric cooperative the dominant right to provide service. The reasoning of the Court clearly extends to KRS 81A.490 and the Certified Territory Statute. In Southern Bell the Court of Appeals held that the authority to regulate public utilities is a legislative function of the state and the right is essentially a police power. Southern Bell, supra at 696. It went on to hold that "a franchise granted by a municipality is granted subject to

the right of the state to exercise its police power in this respect." [2]. Thus, the franchise granted by the City to Owen here was granted subject to the right of the Public Service Commission to regulate utilities in respect of their service territories.

For the foregoing reasons, the Court concludes that the plaintiffs have not overcome the presumption of constitutionality which attaches to the Certified Territory Statute, KRS 275.016, 278.017 and 278.018, and to KRS 96.538, KRS 81A.490 and KRS 279.110(5). Therefore, it is ORDERED AND ADJUDGED that the Complaint, as amended, of the plaintiffs be, and the same is hereby dismissed, with prejudice, at the cost of the plaintiffs.

In its Counterclaim, Owen seeks a declaration that it has the exclusive right to provide retail electric service to all electric consuming facilities located within its certified territory, including those portions of its certified territory located within the boundaries of the City. For the reasons set forth above, the Court concludes that Owen is entitled to judgment on its counterclaim and, therefore, it is ORDERED AND ADJUDGED that Owen has the exclusive right to provide retail electric service to all electric consuming facilities located within its certified territory, including those portions of its certified territory located within the boundaries of the City.

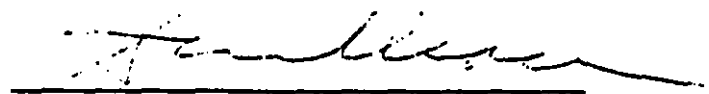
Owen also seeks the entry of an order requiring the City to offer a franchise for the portions of the city which fall within the certified territory of Owen. Such a procedure was authorized in City of Nicholasville, supra at 417-418, and is

appropriate here. Therefore, it is further ORDERED AND ADJUDGED that the City should offer for sale a new franchise on terms fair to the City, Owen and the public, permitting and authorizing Owen to utilize the streets, alleys and public grounds of the City in connection with the furnishing of retail electric service by Owen within portions of its certified territory which are also located within the city limits of the City and, further, that Owen is permitted and authorized to utilize the streets, alleys and public grounds of the City pending the sale of such new franchise.

IT IS FURTHER ORDERED that the plaintiffs' motions for Summary Judgment are hereby overruled.

This is a final order and the Clerk shall give notice of entry hereof pursuant to CR 77.04.

Dated this 24 day of August, 1990.



JUDGE, BOONE CIRCUIT COURT

COPIES TO:

HUGH O. SKERR, ESQ.
GARY SERGEANT
I. DAVEY
ROBERT M. [REDACTED] ESQ.
STEPHEN E. [REDACTED]
WILLIAM E. [REDACTED]

NOTICE

All parties will take notice that this order was entered in Office of The Boone Circuit Court Clerk on the 24 day of August, 1990

PAT CUTLER
BOONE CIRCUIT COURT

 D.C.